IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.4479 OF 2004

Colgage Palmolive India Ltd.
and others ... Applicants
versus
State of Maharashtra & another ... Respondents

Shri Shirish Gupte, Sr.Counsel with Subodh Desai for applicants.

Miss Rajeshree M. Gadhavi, APP for respondents.

CORAM : S.C.DHARMADHIKARI, J.

DATE OF RESERVING THE JUDGEMENT : 21.09.2006

DATE OF PRONOUNCING THE JUDGEMENT : 05.12.2006

JUDGEMENT :-

1. Rule. Respondents waive service. By consent of both sides heard forthwith.

2. By this application under section 482 of Code of Criminal Procedure, 1973, the applicant M/s.Colgate Palmolive India Limited and others have sought quashing of Criminal Complaint bearing No.454/S/2002 pending before the learned Additional Chief Metropolitan Magistrate, 24th Court, Borivali, Mumbai.

3. Brief facts leading to the filing of this petition are set out herein below.

4. The applicants are being prosecuted on the basis that they have violated the standards of Weights and Measures Act, 1976 and standards of Weights and Measures (Packaged Commodities) Rules, 1977. The prosecution alleges that second respondent Assistant Controller of Legal Metrology, District No.III, on 19th December 2001, visited a General Store premises at Malad, Mumbai. They inspected the packaged commodities kept and displayed for sale. It was found on examination of the labels/print that two packaged commodities containing Colgate Total Plax (250 ml.) manufactured by M/s.Acra Pac (I) Pvt.Ltd. and marketed by applicants, were displayed for sale. However, retail sale price was not declared as per Rule 2(r) of Packaged Commodity Rules, 1977. It is alleged that the manufacturer admitted the offence and agreed for compounding the same departmentally. However, the manufacturer did not pay the compounding fee as per the order issued by the Deputy Controller of Legal M.M.Region, Mumbai. Hence, Complaint No.379/S/2002 was filed against the manufacturer

in the Court of Additional Chief Metropolitan Magistrate, 24th Court, Borivali, Mumbai. The manufacturer pleaded guilty and paid fine of Rs.12,000/- in the Court vide money receipt dated 27th October 2004.

5. The applicant is marketing the seized packaged commodity. The said commodity was sold/distributed by the applicants. The seized package does not bear the complete address of the applicant. Complaint No.454/S/2002 was instituted against the applicant in the Court of Additional Chief Metropolitan Magistrate, 24th Court, Borivali, Mumbai. The complaint is pending. Thus, they are guilty of offences punishable under sections 39 and 63 of the Standards of Weights and Measures Act, 1976 r/w Rule 23(1) of the Packaged Commodity Rules, 1977 (hereinafter referred to as "the Act and P.C.Rules").

6. Shri Gupte - learned senior counsel appearing for the applicant submits that the seized product is a preparation covered under the Drugs and Cosmetics Act and Rules made thereunder so also by Drugs (Price Control) Order, 1995. This is evident from the fact that it is manufactured by

Acra Pac (I) Pvt.ltd. under a Drug manufacturing licence bearing No.G-650. Being a drug preparation it is also governed by the provisions of Drugs (Price Control) Order, 1995. He submits that as per clause-2(f)(iii) of the Drugs (Price Control) Order, 1995, a drug includes "Bulk drug" and "formulations". There are two types of formulations "scheduled" and "non-scheduled" formulations. A non-scheduled formulation means a formulation not containing any bulk drug specified in the First Schedule to the Drug Control Order.

7. He submits that the seized product in this case is a "Non Scheduled Formulation". Being a non scheduled formulation, the Packaged Commodities Rules do not apply. There is a specific exemption given under Rule 34(1)(e) of the P.C.Rules as amended. He submits that as per clause/para 15 of the Drugs Control Order, there is an obligation to declare retail price of this package in the form prescribed. He submits that there is complete compliance with the provisions of Drugs Price Control Order. He has invited my attention to the fact that there are strict provisions which have to be complied with before a drug can be distributed and sold in the market.

A price list has also been prepared and properly displayed. He submits that once there is a clear exemption from the provisions of P.C.Rules by virtue of Drug Control Order, then there is no offence committed by the applicants and consequently the complaint itself would not lie. He submits that once the product which is seized is not covered by the P.C.Rules, then there is no question of the applicants being held guilty of violation of Rules and Act. For all these reasons, he submits that the proceedings be quashed.

8. On the other hand, Ms.Gadhavi - learned APP appearing for the respondents submitted that the present petition/application is not maintainable. It is directed against an order whereby a process has been issued to summon the applicants in the criminal complaint. She submits that against such an order the remedy of the applicants is to approach the Sessions Court by way of a revision application. She has invited my attention to a judgement of this Court reported in 2005(3)-Mh.L.J.-778 (V.K.Jain and others Vs. Pratap V. Padode and another).

9. On merits, she submits that the applicants

are guilty of violation of the Act and Rules because the commodity/drug is a packaged commodity. She submits that at one stage the applicants had admitted their guilt and agreed to compound the offence. In such circumstances and considering the conduct of applicants, they are not entitled to invoke the inherent jurisdiction of this Court u/s 482 of the Cr.P.C..

10. She submits that the seized product was being distributed by the applicants. This is a packaged commodity which is covered by the P.C.Rules. She submits that merely because a seized commodity/product is a drug, does not mean that the same should not comply with the provisions of Act and P.C.Rules. She submits that the Act has been given an over riding effect. In such circumstances, there is no question of the applicants being prima facie not guilty of the offences alleged. She further submits that the Drugs Price Control Order, 1995 was issued by the Central Government in exercise of the powers conferred by Section 3 of the Essential Commodities Act. She submits that the definitions of the term "Drug", "Formulation", "Non Scheduled Formulation", "Scheduled Bulk Drug" and "Non Scheduled Bulk Drug" would mean

that the Rule with regard to the display of prices of non scheduled formulation covered by the Drug Control Order, is inconsistent with the Act. That Rule will be of no effect by virtue of the overriding provision contained in the Act. She submits that the P.C.Rules are framed under the Act and they will, therefore, prevail. She submits that the printing of the seized package does not satisfy the requirement stipulated by the Act and Rules. Across the column Local-Tax there is a blank indicating No Tax. Hence, the infirmity/lacuna is a violation of Rule 33(1) of the P.C.Rules. The provisions are made for the protection of consumers and to safeguard their interest. If the applicants are allowed to get away with a technical objection, then the very purpose of framing the P.C.Rules and consequently the Act, would be defeated and frustrated. For all these reasons, this application be dismissed.

11. For properly appreciating the rival contentions a reference is necessary to the relevant statutory provisions. The Standards of Weights and Measures Act, 1976 has been enacted for the purposes of establishing standards of weights and measures, to regulate inter-state trade or commerce in weights, measures and other

goods which are sold or distributed by weight, measure or number and to provide for the matters connected therewith or incidental thereto. Section 2(b) defines term "commodity in packaged form". It also defines the term "dealer", "label", "manufacturer" in sub clauses (c), (n) and (o) of this section.

12. The Chapters are divided in parts. Part-II deals with establishment of Standards of Weights and Measures. Therein, Chapter-I is entitled standard units. Chapter-II deals with physical representation of standard units whereas Chapter-III is entitled standard weights and measures. Chapter-IV deals with custody and verification of standard equipment. Here, Part-II ends.

13. Part-III deals with Appointment and Powers of Director and other staff. Part-IV deals with Inter-state trade or commerce in weight, measure or other goods. This is again divided into two Chapters. We are not concerned with this aspect of the matter. Section 39 which falls in Chapter-IV of Part-IV deals with quantities and origin of commodities in packaged form to be declared. Part-V is dealing with import and

export of weights and measures.

14. Part-VI is entitled offences and their trial. Part-VII and Part-VIII contain sections pertaining to Training Institute and Miscellaneous provisions.

15. The broad scheme of the Act is thus set out hereinabove. The purpose of enacting the same is to establish standards of weights and measures and to regulate inter-state trade and commerce in weights, measures and other goods. Naturally, therefore, regulatory and prohibitory provisions are made.

16. Section 82 of the Act confers powers to make Rules. The Rules are to be made for carrying out the provisions of the Act.

17. The Packaged Commodity Rules are made under this provision. The packaged commodity rules are applicable to commodities in the packaged form which are intended or likely to be sold, distributed or delivered or offered or displayed for sale, distribution or delivery or stored for sale or for distribution or delivery in the course of Inter-state trade or commerce. Rule 2

sets out certain definitions. It is pertinent to note that the word "package" is not defined but several terms namely "combination package", "Group package", Multipiece package", Pre packed commodity" are defined in the Rules. The term "pre packed commodity" is defined in Rule 2(l) and reads thus:-

> "Rule 2(l):- pre-packed commodity" with its grammatical variations and cognate expressions, means a commodity or article or articles which, without the purchaser being present, is placed in a package of whatever nature, so that the quantity of the produce contained therein has a pre-determined value and such value cannot be altered without the package or its lid or cap, as the case may be, being opened or undergoing a perceptible modification and the expression "package", wherever it occurs, shall be construed as a package containing a pre-packed commodity
>
> Explanation I : Where, by reason merely of the opening of a package no alteration is caused to the value, quantity, nature or characteristic of the commodity contained therein, such commodity shall be deemed, for the purposes of these rules, to be a pre-packed commodity; for example, an electric bulb or flourescent tube is a pre-packed commodity, even though the package containing it is required to be opened for testing the commodity.
>
> Explanation II : Where a commodity consists of a number of components and these components are packed in one, two or more units for sale as a single commodity, such commodity shall be deemed for the purpose of these rules, to be a pre-packed commodity."

The term "retail sale" is defined in Rule 2(q) and the term "retail sale price" is defined in rule 2(r) which read thus :-

> "Rule 2(q) :- 'retail sale', in relation to a commodity, means the sale, distribution or delivery of such commodity through retail sales agencies or other instrumentalities for consumption by an individual or a group of individuals or any other consumer;
>
> Rule 2(r) 'retail sale price' means the maximum price at which the commodity in packaged form maybe sold to the ultimate consumer and where such price is mentioned on package, there shall be printed on the packages the words 'maximum or max. retail price ... inclusive of all taxes or in the form MRP Rs... incl. of all taxes.'
>
> Explanation : For the purposes of the clause 'maximum price' in relation to any commodity in packaged form shall include all taxes, local or otherwise, freight, transport charges, commission payable to dealers, and all charges towards advertisement, delivery, packing, forwarding and the like, as the case may be."

Rule 6 which falls in Chapter-II of the rules deals with declarations to be made on every package. There are provisions in the rules which set out the nature of declarations, the packages which should contain the same, the details of declaration, additional declarations to be made on combination packages and multipiece packages etc.. Rule 23 contains provisions relating to

wholesale Dealer and Retail Dealer. Rule 24 sets out procedure for examination and Determination of quantity and error in packages at the premises of the manufacturer or packer. Various actions to be taken on examination of packages are enumerated in Rules 25 and 26 whereas Rule 27 provides for establishment of maximum permissible error on package. Chapter-III of the rules appears after Rule 28. Rule 28 is dealing with deceptive packages. Chapter-III contains rules which are to be applied to wholesale packages. Chapter-IV deals with export and import of packaged commodities. In this matter, I am concerned with Rule 34 falling in Chapter-V entitled as Exemptions. Rule 34 reads thus :-

> "34. Exemptions in respect of certain packages:-
>
> Nothing contained in these rules shall apply to any package containing a commodity if,-
>
> (a) the marking on the package unambiguously indicates that it has been specifically packed for the exclusive use of any industry as a raw material or for the purpose of servicing any industry, mine or quarry :
>
> PROVIDED that this exemption shall not be available in respect of -
>
> (i) any yarn which is sold in hanks to handloom weavers;
>
> (ii) any component, part or material used in any workshop, service station or any

other place where servicing or repairing of any bicycle, tricycle or motor vehicle within the meaning of Motor Vehicles Act, 1939 (4 of 1939), is undertaken;

(iii) any package containing a commodity of net content of 5 kilogram o 5 litre or less and displayed for sale at the retail outlet.

(iv) any package containing a commodity to be sold by number or length and displayed for sale at the retail outlet.

(b) the net weight or measures of the commodity is twenty grams or twenty millilitres or less, if sold by weight or measure :

PROVIDED that this exemption shall not apply to package containing any drug or medicine :

PROVIDED that the declaration in respect of maximum retail price and net quantity shall be declared on packages containing 10g to 20g or 10ml to 20 ml.

(c) Omitted.

(d) any package containing fast food items packed by restaurant/hotel and the like.

(e) drugs covered under the Drugs (Price Control) Order, 1995.

(f) agricultural farm produces in packages of above 50 kg.

If the making on a package unambiguously indicates that the commodity in the package is for the exclusive use of any industry as a raw material or for the purpose of servicing any industry, mine or quarry, then Inspector or Controller of Legal Metrology is not authorised under rule 34 to determine for himself whether the contents of the package, in fact, is a raw material meant for the exclusive use of the concerned industry. This is a judgment of Andhra Pradesh High Court in petition No.2135 of 1984

delivered on July 5, 1985."

A bare perusal of Rule 34 would indicate that nothing contained in the P.C.Rules shall apply to any package containing a commodity if it contains scheduled formulation and non-scheduled formulations covered under the Drugs (Price Control) Order, 1995 made under section 3 of Essential Commodities Act, 1955.

18. The purpose of granting exemption from the P.C.Rules to the package containing a commodity which is a drug or formulation as above appears to be obvious. Section 3 of the Essential Commodities Act, 1955 empowers the Central Government to enact such orders providing for regulating or prohibiting production, supply and distribution so also trade and commerce in essential commodities. The word "essential commodity" is defined in Section 2(a) and it means the classes of commodities specified therein. Drugs have been included within the concept and definition of Essential Commodities. Therefore, naturally, the provisions contained in Section 3 of the Essential Commodities Act would apply to Drugs as well. Drugs (Price Control) Order, 1995 is made for the purposes of

controlling the prices of drugs which are essential commodities. Clause-2 of this order contains definitions. The terms which are defined include "bulk drug", "drug", "dealer", "distributor", "formulations" etc.. The power to fix the maximum sale price of bulk drugs defined in the first schedule is contained in Clause-II of this order. The term "drug" being an inclusive definition and includes bulk drugs and formulations, the power which is conferred by clause-3 and other clauses would apply to the same.

19. A reading of the Drugs Control Order would reveal that when there is a power to fix price all incidental and analogous matters are provided and taken care of. When price is to be fixed, naturally, the said price is capable of being revised. When price is fixed there is an obligation to display the same. Once such power is conferred, enforcement of obligations which are imposed by the regulatory measures, is also provided for. Therefore, the argument of learned APP that the P.C.Rules would continue to apply to the drugs or the formulations dealt with by the petitioner, cannot be accepted. The exemption is granted keeping in mind the provisions of Drugs

Control Order and Essential Commodities Act. The exemption from the P.C.Rules with regard to scheduled formulations and Non-scheduled formulations covered under the Drugs Control Order came into effect from 1st December 2003. It appears that the Rule 34(e) was substituted by G.S.R.760(E) dated 24th September 2003. The same was brought into effect from 1st December 2003. Thus, the P.C.Rules, 1977 ceased to apply to a Package containing formulations and non-scheduled formulations covered by the Drugs (Price Control) Order, 1995 made u/s 3 of Essential Commodities Act, 1953. That is because the Essential Commodities Act was amended and the Price Control Order with regard to drugs was promulgated in 1955. Thus, a complete Code with regard to pricing of drugs is enacted by the Drugs Control Order. Drugs are essential commodities. It is not disputed before me that the formulations which are dealt with and distributed by the petitioner fall within the term Drugs as defined in the Control Order of 1995. Thus, with regard to the drugs, it cannot be said that both, the Control Order as also the P.C.Rules, would apply. The moment the package contains the commodity which is included in the exemptions provided by the P.C. Rules, then insofar as that commodity

is concerned, its package would not fall within the purview of P.C.Rules.

20. It is not as if there is no measure or provision dealing with packages containing a commodity which is a scheduled formulation and non-scheduled formulation covered by the Drugs Price Control Order. A bare perusal of the Drugs Price Control Order would reveal that whenever the prices are fixed for the drugs and formulations, the obligation to sell and distribute them at that price follows. Thereafter, if the prices are revised the price charged must be revised price. Rules 14 and 15 of the Drugs Price Control Order read thus:-

> "14. Carrying into effect the price fixed or revised by the Government, its display and proof thereof.-
>
> (1) Every manufacturer or importer shall carry into effect the price of a bulk drug or formulation, as the case may be, as fixed by the Government from time to time, within fifteen days from the date of notification in the Official Gazette or receipt of the order of the Government in this behalf by such manufacturer or importer.
>
> (2) Every manufacturer, importer or distributor of a formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation, notified in the Official Gazette or ordered by the

Government in this behalf, with the words "retail price not to exceed" preceding it, and "local taxes extra" succeeding it, in the case of Scheduled formulations:

Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the pro-rata retail price of the main pack rounded off to the nearest paisa.

(3) Every manufacturer or importer shall issue a price list and supplementary price list, if required, in Form V to the dealers, State Drugs Controllers and the Government indicating reference to such price fixation or revision as covered by the order or Gazette notification issued by the Government, from time to time.

(4) Every retailer and dealer shall display the price list and the supplementary price list, if any, as furnished by the manufacturer or importer, on a conspicuous part of the premises where he carries on business in a manner so as to be easily accessible to any person wishing to consult the same.

15. Display of prices of non- Scheduled formulations and price list thereof.-

(1) Every manufacturer, importer or distributor of a non-Scheduled formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation with the words retail price not to exceed preceding it and the words local taxes extra... succeeding it.

Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the pro-rata retail price of

> the main pack rounded off to the nearest paisa.
>
> (2) Every manufacturer or importer shall issue a price list and supplementary price list, if required, of the non-Scheduled formulations in Form V to the dealers, State Drugs Controllers and the Government indicating changes, from time to time.
>
> (3) Every retailer and dealer shall display the price list and the supplementary price list, if any, as furnished by the manufacturer or importer, on a conspicuous part of the premises where he carries on business in a manner so as to be easily accessible to any person wishing to consult the same."

Rule 19 which follows Rules 16 and 18 specifically deal with the price of formulations sold to the dealer. There is a control of sale price of bulk drugs and formulations. No person shall sell any bulk drug or formulation to any consumer at a price exceeding the price specified in the current price list or price indicated on the label of the container or pack plus all local taxes, if payable. This provision coupled with one referred to by me takes care of not only the sale price charged to the consumer but the manner in which the price is to be displayed upon the container and packages containing drugs and formulations. There is an obligation to maintain records and the same are liable to be produced for inspection of the authorities under Control

Order and the Essential Commodities Act. There is a power of entry, search and seizure. There are further powers including Review and Issuing Guide-lines and Directions. There is a power of Exemption under the Drugs Price Control Order as well. There are penalties for contravention of the Drugs Control Order and persons guilty of violation thereof are liable to be punished in accordance with Essential Commodities Act.

21. The First Schedule to the Control Order speaks not just only of the drugs but bulk drugs. The bulk drugs are defined to mean any pharmaceuticals, chemical, biochemical or plant product including its salts, esters, stereo-isomers and derivatives, conforming to pharmacopoeial or other standards specified in the Second Schedule to the Drugs and Cosmetics Act and which is used as such or as an ingredient to any formulation. In the Drugs Control Order, both "Non-Scheduled Formulation" (Cl.2{p}) and "Schedule Formulation" (Cl.2{v}) are defined. Thus, it is undisputed that this order applies to both.

22. It is not contended before me that the product "Colgate Total Plax" is not a non

scheduled formulation. Once it is not so disputed, then the exemption provided by the P.C.Rules would apply insofar as the product dealt with by the petitioner. There is no need, therefore, to consider the effect of the overriding provision in the Standards of Weights and Measures Act, 1976. The very provision namely 1976 Act provides for making of Rules in respect of packaged commodities. These rules have a chapter which deals with exemptions. The Rules exempt drugs and scheduled as well as non scheduled formulations. Therefore, it is futile to contend that the Act and P.C.Rules would prevail over the Drugs Price Control Order, 1995. Once there is an exemption from the P.C.Rules, then there is no need to comply with them. If there is no obligation to comply with them, then any violation thereof is not an offence at all. In the light of this legal position and when it is not disputed that non scheduled formulation dealt with by the petitioner is covered by the Drugs Price Control Order, then prosecution of the petitioner for violation of P.C.Rules and 1976 Act is wholly illegal and unsustainable.

23. As a result of the above discussion and on this count alone the application is liable to

succeed. Rule is accordingly made absolute in terms of prayer clauses (b) and (c).

(S.C.DHARMADHIKARI, J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.4479 OF 2004

DATE OF DECISION : 05th December 2006

FOR APPROVAL AND SIGNATURE OF :

THE HON'BLE SHRI JUSTICE S.C.DHARMADHIKARI :-

1. Whether Reporters of Local papers may be allowed to see the judgement:

2. To be referred to the Reporters or not ?

3. Whether Their Lordships wish to see the fair copy of judgement ?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder ?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgement should be sent to Nagpur, Aurangabad and Goa Offices ?